No. 15857

United States
COURT OF APPEALS
for the Ninth Circuit

KENNETH J. PHIPPS,

Appellant,

vs.

N. V. NEDERLANDSCHE AMERIKANSCHE STOOMVART, MAATS, a Corporation, also known as HOLLAND-AMERICA LINE,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Oregon.

WILLIAM G. EAST, Judge

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STATEMENT OF THE CASE

Phipps, a longshoreman employed by W. J. Jones & Sons, Inc., master stevedore, was injured by a piece of lumber which fell from a sling load which the stevedore was loading into No. 3 hatch on defendant's ship, the DALERDYK. The hatch where he was working is known sometimes as a trunk hatch or a tunnel hatch. It was about 20 feet square and continued downward vertically in that dimension until it reached the hold, from which point it extended forward in a "tunnel"

about 40 feet long and about 10 feet high, the full width of the ship. The lumber was being stowed in this tunnel and there was plenty of room to work there and plenty of room for the longshoremen to step inside the tunnel and thus be out of the way of sling-loads being lowered down through the 20-foot square of the hatch. The loads were rough lumber, 3 × 6s, 15 to 20 pieces in a sling load, from 24 to 36 feet long, with an occasional stick possibly 40 feet. Because of the length of the loads they had to be tilted to go down the hatch, and this was accomplished by fastening the sling a little bit off-center of the load so that the load hung at an angle. The sling was equipped with a device which tightened up on the load, and, except in this one instance, firmly bound the pieces together. This is a usual and very common method of loading long lengths of anything whether steel rails, long timbers, or anything else, into cargo hatches. The details of the work were entirely in the hands of the master stevedore. The appellee had nothing to do with them at all. The only thing the appellee did, through its agent, was to designate the hatches into which the cargo was to be stowed. There was no failure of any ship's gear of any kind whatever. There were various allegations of unseaworthiness and negligence. They are set forth on pages 8 and 9 of Appellant's Brief. But the substance of plaintiff's complaint was that the defendant was negligent in directing the stevedore to stow the lumber in this particular hatch, and that the hatch was "unseaworthy" to receive lumber of that length. The Trial Court decided that plaintiff had not sustained any of his allegations, and directed a verdict for defendant.

SUMMARY OF ARGUMENT

Appellee is not liable for injuries sustained by an employee of an independent-contractor-stevedore in the normal course of the work, where there is no proof of any negligence of the appellee or unseaworthiness of the ship contributing to the injuries. The Court correctly directed a verdict for defendant.

ARGUMENT

Before proceeding to the main argument we notice the statement on page 15 of Appellant's Brief:

> "Appellant contends that the same rule followed by the United States Supreme Court in Jones Act and Federal Employers' Liability Act cases, under its broad interpretation of common law standards as to negligence, also applies in the case at bar."

It is well known that, since the Jones Act applies only to employer and employee relations, and since a longshoreman is not an employee of the shipowner, the Jones Act has no application.

THE COURT CORRECTLY DIRECTED A VERDICT FOR DEFENDANT

No Unseaworthiness

There was no evidence of any unseaworthiness. No evidence of any failure or defect in the vessel or its equipment. All the evidence showed the vessel's gear was operating properly. Following the accident, loading resumed at the hatch involved. There was no necessity

to repair or alter the vessel's loading gear before loading resumed. The record is void of any evidence of unseaworthiness.

No Negligence

The record is also void of any evidence of negligence. All the evidence shows that loading of cargo such as lumber, pipe, girders, rails, is often brought into a vessel's hold on one sling. All the evidence shows this can be done without sliders.

In fact, on this very ship, the evidence shows that on six other voyages lumber cargo had been stowed in the No. 3 hatch in essentially the same way (that is, tilted and on one sling) without accident. Further, following the accident the stevedore company resumed loading at the No. 3 hatch and filled the hatch with the same lumber cargo as they were loading before the accident.

The stevedore company hired by the defendant to load its vessel was W. J. Jones & Son, Inc. That company has been in the stevedore business in the Northwest over 30 years. During that time it obtained a substantial share of the stevedore business in the area, and of that share a substantial part has been lumber cargo. The record shows beyond question that the defendant hired a competent and experienced stevedore company. In addition, W. J. Jones & Son had loaded this very vessel on six other occasions and each time lumber cargo was loaded into the No. 3 hatch in essentially the same manner.

In summary, the defendant hired a competent and experienced stevedore company to load its vessel. The stowage of the lumber cargo in the vessel's No. 3 hatch required the stevedore company to bring the lumber in tilted and on one sling. This is a common practice in the shipping industry, and can be done in safety. It was the stevedore company's job to avoid sliders. It was in charge of the details of the loading. Following the accident, loading resumed at No. 3 hatch, and it was filled without change or repair of the vessel's gear or equipment.

ARGUMENT

The question presented in this case is a very simple one—is a defendant shipowner whose ship's appliances are all in order, and who has no control over the method or details of the stevedore's work, liable for an injury to an employee of that stevedore, sustained in the normal loading of the vessel?

The answer clearly is, that he is not. The stevedore is an independent contractor. It is he who employs the longshoremen, furnishes part of the loading gear, and directs their work.

The authorities are very clear on this, and under the long-established law of independent contractor, could not be otherwise.

As long ago as *Dwyer v. National Steamship Co.*, 17 Blatchford 472 (4 Fed. 493), Judge Benedict, the eminent judge who was the father of Benedict's Admiralty, in a case where a fatal injury was caused by the negli-

gence of an independent stevedore-contractor, and where an attempt was made to hold the steamship company liable, ruled otherwise and closed his opinion with this quotation:

> "If an indepedent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable." Blatchford (p. 478).

Coming to the more recent cases:

In *Gallagher v. U. S. Lines Co.*, 206 F.(2d) 177, Gallagher, a longshoreman, was injured by a bale of cargo falling from an "airplane skid" being used by his employer, Hogan, the independent stevedore. (Just as Phipps was here struck by a falling piece of cargo). The stevedore contract provided that the equipment to be used in loading should be "such equipment approved by the Owner as is best adapted for the proper and safe handling of the cargo, passenger baggage, and mail." It was on the basis of this that Gallagher sued the shipowner, on the theory that the airplane skid was improper equipment. The Court of Appeals for the Second Circuit held that this phrase was not intended to reserve to the shipowner any detailed control of the work that would make it liable for such an injury, but was only to insure that Hogan, the stevedore, complied with its contract to do the stevedoring work on the owner's vessels. In the course of the opinion the Court stated the law of independent contractors:

> "Thus, a general liability to control the work in order to insure that it is satisfactorily completed in accordance with the requirements of the contract

> does not of itself make the hirer of an independent contractor liable for harm resulting from negligence in conducting the details of the work, . . ." (p. 179)

The Trial Court had submitted to the jury the question whether the shipowner should have prevented Hogan from using the airplane skid, and on this question the jury rendered a verdict against the shipowner of $250,000. This, the Court of Appeals said was error, and reversed the case with directions to enter a judgment in favor of the shipowner, saying,

> "Responsibility for the method of discharging the cargo was left entirely to Hogan; the only proviso was that it must be done to the 'owner's satisfaction'." (p. 180)

In *Berti v. Compagnie de Navigation Cyprien Fabre,* 213 F.(2d) 397, Berti, a longshoreman employed by the American Stevedores, Inc., an independent contractor, who was standing on a hatch-cover, was dumped into the hold when a winch cable dislodged a supporting beam. He sued the shipowner, alleging unseaworthiness in the beam and the cable, and negligence for failure to provide safe equipment and adequate inspection and adequate supervision for the loading. The Trial Court, in instructing the jury, told them that "the master of the ship is still in charge and that those underneath him could have *stopped the work* if they thought that what the plaintiff was doing was unsafe. They could not tell him how to do the work, but they could stop him from continuing to do it if they felt there was a danger or hazard in connection with the work" (p. 399). (It is one of the allegations in the present case that defendant Holland-America Line should have stopped

the work — "Defendant-appellee failed to stop said work." Appellant's Brief, p. 8).

The Court of Appeals held that this instruction was error. It said:

> "The inference appears unmistakable that Cyprien could be found liable, desipte fully adequate equipment, solely on the basis of its failure properly to supervise the operation. This we think was fatal error."

In the present case it is one of the contentions that Hodges, the appellee's local agent, was on the ship from time to time on the day of the accident. In this connection the following quotation from Berti is pertinent:

> "American relies heavily on the fact that two of Cyprien's men were present at the hatch supervising distribution of the cargo and guarding against pilfering. But there is no evidence that they were in any other way concerned with the manner in which American performed its work."

and the Court then quotes the language from the Gallagher case, which we have already set forth. Of course Hodges had nothing whatever to do with the manner in which Jones, the independent stevedore, did the loading. All Hodges did was "to see that the cargo gets to the ship," but as to the method of loading, "We don't have any control of that" (Tr. 248).

In the Berti case the Court further enunciated the true doctrine:

> "If plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision, he has no recourse against Cyprien." (p. 400)

And again,

> "As for the manner in which the work was performed, and any resulting transitory conditions, such as the partly covered hatch, which may have been unsafe, American's assumption of control relieved Cyprien of responsibility." (p. 401)

In *Salmond v. Isbrandtsen Co. Inc.,* 1955 A.M.C. 2334, the Appellate Division of the New York Supreme Court considered the case where American Stevedores Inc., as an independent contractor, was removing some concrete ballast from a ship belonging to Isbrandtsen Co. A piece of the concrete broke off the block while it was suspended in mid-air, just as the lumber broke out of the sling-load here, and struck and injured one of the stevedore's employees.

> "The details of the work were under the complete supervision of American and plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision. . . .
>
> "There is no proof either that the vessel, or its equipment, or any of its appliances was defective, or that the equipment used was not reasonably fit for the use for which it was intended. Plaintiff's employer was in sole control of the details of the work, and plaintiff's injuries resulted solely from the manner in which the work was done under his employer's supervision. Under such circumstances, there is no liability either on Isbrandtsen or on Bethlehem." (p. 2335)

For an Oregon case discussing these principles learnedly and at length, see *Warner v. Synes,* 114 Ore. 451.

Hardly anything more need be said. The work here was under the complete control of Jones. The work was not inherently dangerous, but was done in the

customary and long-used manner, the recognized way of loading long lengths into the hatches of a ship. The working area was not confined or dangerous. The men had a tunnel 40 feet long, and in width as wide as the ship in which to work, and out of the way of descending loads. One of the men themselves described it as "quite a bit of floor area . . . a big one" (Tr. 29).

Appellant claimed that appellee did not furnish a "safe place to work" (that much-abused phrase). There was absolutely no proof of this. The fact that the slider slipped out of the load while in the control of the stevedore is no proof whatever that the appellee failed in its duty to furnish a safe place to work. That duty at most would be to furnish safe ship's gear and equipment for the loading.

Although it is unncessary for the appellee to resort to it, the case of *Hawley v. Alaska Steamship Co.,* in this Court, 1956 A.M.C. 1877, held that a space of "only two or three feet between the edge of the hatch coaming and the tiers of salmon behind him" was enough and constituted a safe place to work (p. 1879).

Appellant's claim that the lumber should have been loaded into the larger hatches on the ship is irrelevant. A ship has to load its cargo with reference to many things—contamination from other cargo taint, odors, etc.; leakage; proper trim of the ship; accessibility of the cargo for discharge in rotation at the various ports of call; and many other things. The question is not whether the long lengths could have been loaded, as contended, more safely in the larger hatches. The question, as the

Trial Court properly held, was merely whether the appellee was guilty of negligence because it ordered this cargo to be loaded in the smaller hatch. And there was absolutely no such proof of such negligence. The appellee left the details to the stevedore and from then on it was up to him.

Incidentally, hatches on the ship were stated by Mr. Hodges to have been:

> "No. 1 is about, oh, about 20 by 24. I think No. 2 is about 20 by 36. No. 3 is about 20 by 20. No. 4 is about 16 by 20. No. 5 is about 20 by 36. 6, I believe, is about 20 by 30." (p. 239)

In view of this it is evident that no long lengths could have been lowered into any of these hatches without tilting them on a single sling, although it is possible that the shorter lengths may have been loaded on double slings.

EXCLUSION OF EVIDENCE
SUMMARY OF ARGUMENT

The Trial Court properly excluded plaintiff's proffered evidence that the larger hatches could have been used instead of the tunnel hatch.

ARGUMENT

The Trial Court excluded plaintiff's proffered evidence that the larger hatches on the ship could have been used with greater safety. The Court was correct. Whether they could have been used or not was not the question in issue.

> "It is clear on principle and fully established by the authorities that evidence of the existence of better or safer machines or appliances is not admissible for the purpose of establishing the legal standard for conduct in negligence cases." *Doucette v. Vincent,* 194 F. (2d) 834, 837.

Its admission for other purposes is discretionary.

While this sort of evidence "is never admissible for the purpose of fixing the substantive legal standard by which to measure a defendant's conduct, it is admissible in the discretion of the trial court, if accompanied by suitable cautionary instructions. . . ." (Id. p. 838). Continuing, the Court said:

> " . . . Thus a trial court may exclude it if in that court's opinion the evidence, while relevant, would be of too little value in comparison with the prejudice it would create, the surprise it would cause, or the confusing ancillary issues it would raise. . . ." (Id. p. 838)

So here, if evidence as to use of the larger hatches had been admitted, it would have raised the collateral and ancillary issues as to whether additional lumber loaded there, and not in the tunnel hatch, would have affected the trim of the ship, whether there was room in the larger hatches for this additional lumber, whether it might have affected other cargo in those larger hatches either from the taint of green lumber or the weight of such lumber superimposed on other cargo, and particularly whether loading this particular lumber in those hatches could have been done at all, considering the necessity, in all shipping operations, of loading cargo so that it may be conveniently reached for discharge at the port of call for which it is destined.

The evidence, therefore, was not admissible to establish a rule of conduct, and if admissible for any purpose at all, it was in the discretion of the Trial Court to admit it or reject it. The Trial Court rightly chose to reject it.

APPELLANT'S AUTHORITIES

Appellant cites many cases in support of the rule that if there is any evidence in support of plaintiff's claim, the case must go to the jury.

But here there was no such evidence.

While evidence of negligence, even slight negligence, if proximately causing the injury, can carry the case to the jury, it must not be forgotten that the evidence of such negligence must be more than a scintilla. It must be *substantial* evidence. *Hawley v. Alaska Steamship Co.,* 1956 A.M.C. 1877, at page 1880. There was none here.

On all counts the judgment of the Trial Court, entered on a directed verdict, should be affirmed.

Respectfully submitted,

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